

## MTC WorkGroup Issues 9-7-18

Scott Letourneau, Sales Tax System Input

***Rank Issues, add comments and if not a part of it.***

### Issues

1. **Should there be common definitions for the terms such as “marketplace,” “marketplace seller,” “marketplace facilitator,” “referral,” and “referrer,” or equivalent terms?**

#### Priority ranking: 6

**Should this issue be considered by the Work Group? Yes**

If the state has various different terms working, that is okay as long as we are clear on who is a marketplace facilitator, and the key issue here is do they process the money or not; if not, are you going to force each marketplace to funnel the sales tax collected to the marketplace facilitator's merchant account as to collect sales tax on behalf of the seller? My concern is the consequences from sales tax audits at the state level when determining which sales the seller collected sales tax and which sales the marketplace facilitator collected sales tax. In the end, if the goal is to automatically collect sales tax on all sales on all marketplaces and not let the money go to the seller,

this is important. I believe the referral definition from the standpoint of automatically collecting the sales tax may be different where the seller will collect and remit. (should terms be the same).

2. **If a state establishes an economic nexus threshold for requiring collection of sales/use tax, does it clearly indicate when that threshold is met, triggering a registration obligation with respect to a marketplace seller, marketplace facilitator, or referrer? Should states consider a sales volume economic nexus threshold, without an alternative separate number of transactions threshold, or include both sales volume and separate number of transactions in the threshold?**

#### Priority ranking: 1

**Should this issue be considered by the Work Group? Yes**

**Sales Volume Only!** No other country in the world tracks sales units to determine when you need to register for VAT or GST. It is all based upon sales volume. We should do it the same. 99% of sales do

not have a \$500 or more product that adds up to \$100K in sales at 200 units. This would penalize most

sellers who sell a low-priced product, which is most common.

3. **Are registration and return filing requirements in conflict or duplicative? If the marketplace facilitator is required to register, collect and remit the sales/use tax on facilitated sales, then is there a need for the marketplace seller to register or report those same sales?**

#### Priority ranking: 2

**Should this issue be considered by the Work Group? Yes**

Yes, the seller will still need to register for sales tax and file a sales tax return, even if that is the only marketplace they sell on. At some point in the future, they may pass the state economic levels and need to collect and remit for other sales. Most sellers will need to pay

past sales tax which will require them apply for a sales tax permit and filing past returns. Almost all sellers on a MF are behind on sales tax, either 2-3 months or 2-3 years. A local business owner is different; they are the only ones typically not behind. The states may want to consider changing the frequency of filing from a maximum frequency of monthly to quarterly (which matches most countries) which will save on fees to file sales tax returns. This is especially important considering if every state has MF guidelines where the MF collects the tax and the seller has to get registered. This will result in an Amazon third-party seller having to file sales tax returns in 45 states plus D.C. (having to file quarterly as a maximum would save them filing fees vs monthly). I realize that in several states, if sales are low enough, the third-party sellers may have to only remit quarterly or less (annually) based upon sales volume. Capping it off at quarterly filing would make sense.

4. **Should the person registering, collecting, remitting tax and filing returns be the person that the state should audit and require compliance with the state's record keeping requirements?**

**Priority ranking: 3**

**Should this issue be considered by the Work Group? Yes**

Yes, the state should match up who is filing the return for the audit; if it's the seller, audit them; if the MF, audit them. We may have a situation, where the MF, collect and remit sales tax, but the seller will file the return, the way Washington is now.

5. **Should states impose a sales volume-based economic nexus threshold for sales/use tax collection also consider adopting an economic—or factor presence--nexus threshold for income tax?**

**Priority ranking: 4**

**Should this issue be considered by the Work Group? Yes**

Absolutely. It must be clear that a state tax return is only required when the economic nexus levels are passed (assuming the units will be removed).

- Example, seller on MF, has only 20K in sales. They must register for a permit and file sales tax returns because they are over the new \$10K threshold for inventory only, but they are under the \$100K level, so NO state income tax return is required, and NO foreign registration is required.
- Only when they pass the \$100K in a state (again removing the units part) do they need to file a state income tax return and/or foreign qualify in the state.
- Alternatively, the state may consider creating an information return (like Nevada, where under \$4-million it is a simple one-page return) that would be an extra bonus to the sellers. That one they could do on their own vs a full-blown state tax return, which may cost \$600 to \$800 per state for a tax firm to prepare.

6. **Should states strive to simplify the registration process and require the minimum information necessary from the marketplace seller or facilitator?**

Priority ranking: 5

Should this issue be considered by the Work Group? Yes

- Yes. Simplification of the sales tax permit process would be helpful and recommended
- **Areas to simplify for sales tax permit registration:**
  - Foreign sellers that do not have a SSN or ITIN are able to apply (some states do not allow it) and apply online (most do not allow you to apply online and it requires mailing in a paper application).
  - Speed up the registration process time and allow all foreign sellers to register without an ITIN.
  - Do not require a state ID from the Secretary of State before registering for a sales tax permit.
  - foreign qualification for an out-of-state seller with no physical nexus other than inventory and under the state economic threshold.
  - Colorado require a seller foreign qualify in the state first before apply for a sales tax permit, this should be avoided as a required state. I understand each state may recommend you foreign qualify in their state to gain more liability protection, but that should stay as a choice, not required to apply for a permit.

7. **States should provide liability protection to marketplace facilitators when errors in collection and remittance are due to marketplace seller providing erroneous information to the marketplace facilitator.**

Priority ranking: 10

Should this issue be considered by the Work Group? Yes

**Yes, the MP seller should be responsible for inaccurate information provided to the MF.**

1. One challenge is when a seller has products that are exempt from sales tax and others that are not. Will the marketplace over-collect because it collects sales tax on all products listed? Normally, this leads to over-reporting sales tax by the marketplace seller. The other issue will be how accurate are the tax settings by the marketplace facilitator in line with each state? *Open to more input on this one from others.*
2. This is also why the seller needs to register for a permit and have their own account...(more accountability). What if a seller just says all his products are exempt from sales tax? Whose responsibility is it to monitor or evaluate that? The marketplace facilitator is not going to want to have the expertise to evaluate everyone.

8. **Should states include statutory provisions concerning protection of collecting marketplace facilitators against the risk of class action lawsuits?**

Priority ranking: 11

Should this issue be considered by the Work Group? Yes

Yes, because this is guaranteed to happen, and maybe right out of the gates if this comes across that those who were collecting and remitting the last three years are now NOT required to collect and remit. Those who did get into compliance will seek an attorney to sue the states representing all those who unnecessarily paid past sales tax, penalties and interest out of their

own pocket. You must require compliance for past sales tax returns and sales tax due to avoid this issue.

#### **Additional Issues Suggested:**

- 9. How should remote sellers/facilitators handle sales to exempt persons/entities? For instance, for tribal members purchasing products in their Indian country, those sales are exempt in WA, but how should sellers/facilitators handle those transactions? (Washington)**

**Priority ranking: 9**

Should this issue be considered by the Work Group? Yes

Tax exempt sales or entities must be addressed, otherwise will all be taxed. Open to solutions from other members.

- 10. Should states clarify the extent that physical presence is still a relevant inquiry in determining substantial nexus? (Washington)**

**Priority ranking: 7**

Should this issue be considered by the Work Group? Yes

Does inventory (Amazon FBA) in a state create physical nexus? This is important for past sales tax required based upon when the seller first had nexus (stock) and a sale in that state. If someone is not selling on a MF, but on their own website, and using a few third-party warehouses in a couple of states, they need to know if they have nexus or not.

My recommendation is yes, inventory (as most states interpret is in the past) does create sales tax nexus, but not income tax nexus would be my recommendation. In the most recent Bloomberg, 2018 Survey of State Tax Departments (a 500 page report), it contains multiple pages on all the different type of activities that will create both sales tax and income tax nexus. It seems clear that inventory/stock creates sales tax nexus. Attempting to create a dimimus level of stock (based upon units and time held in storage) would not be practical for the seller or the state to audit. The reason this comes up is the responsibility of past sales tax due by sellers who had FBA stock in several states.

- 11. How should states handle foreign sellers' sales through the marketplace facilitator? (Washington)**

**Priority ranking: 8**

Should this issue be considered by the Work Group? Yes

Yes. A U.S. seller cannot sell in the EU, on Amazon, unless they are registered for VAT as they pass the thresholds in each country. In the UK, a foreign seller must register for VAT from the first sale vs a UK company. This is the same pattern for any other country in the world. Why would selling in the U.S., the largest market in the world, be any different? It should not. The fastest growing market of sellers in the world is Chinese sellers. The problem is, up until this point, there was no concern of a foreign seller not collecting or collecting but not remitting U.S. sales tax because how does a state chase a foreign seller in another country? They do not.

The solution is to force compliance (like the UK does with Amazon sellers). Require sellers to be registered with sales tax permits for past sales (assuming the MF is going to collect and remit moving forward). Otherwise, you are giving a free pass to ALL foreign sellers where 95% have decided to not collect or remit U.S. sales tax, but allowing them to move forward and continue with their accounts if the MF is required to collect and remit. This is very unfair to U.S. sellers who have been in compliance over

the last several years.

- 12. Clarification is needed as to whether marketplace sellers in the Amazon FBA Program with inventory in a state are protected under P.L. 86-272 vs. having physical presence or economic nexus. (Paul Rafelson)**

**Priority ranking: 10**

**Should this issue be considered by the Work Group? Yes**

This will tie into all the sellers who have decided that sales tax will go away. They need to be held accountable for deciding not to collect and remit. This will tie into past sales tax being required to be paid by the states.

The reason being this was already clear in the past, that inventory created nexus.

The argument that the third-party seller is not really the seller because they don't own the customer list is the price of admission to sell on Amazon and for Amazon to control the experience.

The bottom line is if the seller purchased the inventory, they own it. And if that inventory they own is in another state, it creates nexus.

This will be answered indirectly by the states determining if they are going after past sales as a requirement for the MF to collect and remit moving forward. This is assuming past sales were due not to an economic nexus threshold (that is straightforward) but for having inventory or stock as an out-of-state seller.

- 13. As a sub-issue to Issue No. 1, should a “carve out” provision be developed in the definition of “marketplace facilitator” to exclude local online delivery services (such as local area restaurant food delivery businesses)? (Alabama)**

**Priority ranking: \_\_\_\_**

**Should this issue be considered by the Work Group? No.**

This is a local issue, which is likely working just fine now, and clarity of the definition will take care of itself.

- 14. Should the definitions for “retailer” and “retail sale” be revised to clarify whether a marketplace seller vs. a marketplace facilitator is considered to be the “retailer” making a “retail sale”? (Paul Rafelson)**

**Priority ranking: \_\_\_\_**

**Should this issue be considered by the Work Group? No.**

This is already involved in the development of what creates nexus.

In the case of Amazon, the seller bought the inventory and created the listing for the right to sell on Amazon. They are the retailer.

If they want control of the client, don't sell on Amazon, sell off your own website. If you don't like the shipping costs and fees, then don't sell on Amazon.

There is a reason why 200-million customers use Amazon every month; it is a controlled and consistent experience. That is their advantage.

If I started to get a string of emails from every purchase I made on Amazon, I would likely buy less from Amazon. There is no need to break down the definitions.

The only purpose of this position “that we are not even the retailer” is to make a point that Amazon FBA sellers, who never collected sales tax, do not owe any past sales tax on states where they had inventory.

- 15. Should states develop payment plan options for marketplace sellers with physical presence nexus that have past sales/use tax liabilities to resolve? (Scott Letourneau)**

**Priority ranking: 9**

**Should this issue be considered by the Work Group? Yes**

Yes. 70-85% (guestimate) of sellers on Amazon FBA were not collecting and remitting sales taxes when they had FBA stock or inventory. There are thousands of sellers who did sell for 1-3 years who have since shut down their Amazon FBA business. All past and current sellers need a way to pay the past sales tax due and making payment plans would be ideal. This would be a priority for current sellers, who should be required to pay past sales tax before their account is active to move forward. This would be a time period of 90 days and to get on a payment plan in each state for 1-2 years depending on the levels of tax due.

- 16. Should states consider including marketplace facilitator provisions in the administrative statutes for other types of excise taxes that involve marketplace facilitators, such as lodging, utilities, transportation services, etc.? (Diane Yetter)**

**Priority ranking: \_\_\_\_**

**Should this issue be considered by the Work Group? No.**

Here is my hesitation with No.

The major concern is that how will these taxes be handled if the MF will not only collect and remit, but file the sales tax return for the seller? Does this mean the seller will have to register for a sales tax permit to pay any of these other taxes that might come up separately?

If the seller has to register for a permit (and the MF will collect and remit) and pay these tax separately, as they apply, then this will be already handled.

**Reminder: next teleconference meeting September 12, 2018 at 2:30 pm, call-in number 1-719-234-0214, passcode# 102826**